

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Petitioner, ) ORDER DENYING RESPONDENT'S MOTION  
 ) TO DISMISS PETITION AS UNTIMELY  
 ) AND SETTING BRIEFING SCHEDULE  
 )  
ADAMS, WARDEN, ) (Docket no. 14)  
 )  
Respondent. )

## INTRODUCTION

Petitioner Sherman Level Davis, a state prisoner, filed a pro  
se petition for a writ of habeas corpus pursuant to 28 U.S.C.  
§ 2254 while he was incarcerated at California State Prison -  
Corcoran. Petitioner has since been transferred to Kern Valley  
State Prison. He challenges the validity of his state conviction.  
Before the Court is Respondent's motion to dismiss the petition,  
alleging that Petitioner's claims are untimely under 28 U.S.C.  
§ 2244(d), the statute of limitations established by the  
Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).  
Petitioner has filed an opposition, and Respondent has filed his  
reply.

For the reasons discussed below, the Court DENIES Respondent's motion to dismiss.

## PROCEDURAL BACKGROUND

On January 20, 2004, the trial court sentenced Petitioner to 443 years to life for fourteen offenses, including second-degree robbery, forced oral copulation, attempted robbery and possession of a firearm by a convicted felon. The California Court of Appeal affirmed the judgment of conviction on October 21, 2005, and the

1 California Supreme Court denied review on February 1, 2006.

2 On April 3, 2008, Petitioner filed the present federal habeas  
3 petition claiming:

4 (1) failure of trial counsel to call witnesses;  
5 (2) failure of trial counsel to present evidence;  
6 (3) failure of trial counsel to impeach witnesses;  
7 (4) failure of trial counsel to suppress evidence;  
8 (5) prosecutorial misconduct; (6) juror misconduct;  
9 (7) failure of trial counsel to investigate misconduct;  
10 (8) failure of trial counsel to conduct a pretrial  
11 investigation and alleged conflict of interest by trial  
counsel; (9) a "cumulative effect of error" depriving  
him of his Fifth, Sixth, and Fourteenth Amendment due  
process rights; (10) error by the trial court in  
denying his motion to dismiss his trial counsel; and  
11 (11) error by the trial court denying his equal  
protection and due process rights as guaranteed under  
the United States Constitution.

12 (July 7, 2008 Order at 2.)

13 In an Order dated July 7, 2008, the Court stayed his federal  
14 petition pending exhaustion of state court remedies as to claims  
15 one through nine. On August 17, 2009, Petitioner filed a state  
16 habeas petition form along with a document entitled, "Notice,"  
17 which stated that he had "exhausted all state remedies of the  
18 (1-9) previously unexhausted claims." (Notice at 1.) The Court  
19 lifted the stay on October 16, 2009 and ordered Respondent to file  
20 an answer.

#### 21 DISCUSSION

22 AEDPA imposes a statute of limitations on petitions for a  
23 writ of habeas corpus filed by state prisoners. Petitions filed  
24 by prisoners challenging non-capital state convictions or  
25 sentences generally must be filed within one year of the date on  
26 which the judgment became final after the conclusion of direct  
27 review or the time has passed for seeking direct review. "Direct  
28 review" includes the ninety-day period during which a criminal

1 appellant can file a petition for a writ of certiorari from the  
 2 United States Supreme Court, whether he actually files such a  
 3 petition or not. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.  
 4 1999).

5 In its July 7, 2008 Order, the Court previously  
 6 considered whether the petition was timely:

7 In the present case, the judgment became final for  
 8 purposes of the statute of limitations on May 5, 2006  
 9 because Petitioner did not file a petition for a writ  
 10 of certiorari in the United States Supreme Court within  
 11 ninety days. Accordingly, Petitioner was required to  
 12 file a federal habeas corpus petition no later than May  
 13 4, 2007. Because he did not file the present petition  
 14 until April 16, 2008 -- nearly a year after the  
 15 limitations period had expired -- the petition is  
 16 untimely unless he can show that he is entitled to  
 17 equitable tolling.<sup>1</sup>

18 (July 7, 2008 Order at 4 (footnote added and citation omitted).)

19 The Supreme Court has determined that AEDPA's statute of  
 20 limitations is subject to equitable tolling in appropriate cases.  
 21 Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). "When external  
 22 forces, rather than a petitioner's lack of diligence, account for  
 23 the failure to file a timely claim, equitable tolling of the  
 24 statute of limitations may be appropriate." Miles v. Prunty, 187  
 25 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be  
 26 available in most cases because extensions of time should be  
 27

28 <sup>1</sup> As of the Court's July 7, 2008 Order, Petitioner had not  
 filed for collateral relief in the state courts; therefore, the  
 Court did not consider whether he was entitled to statutory  
 tolling. As stated above, Petitioner subsequently filed a state  
 habeas petition in the California Supreme Court and exhausted his  
 state remedies as to claims one through nine. Because Petitioner  
 only began seeking habeas relief in state court on August 18, 2008  
 -- after the one-year statute of limitations had expired -- the  
 period of time his claims were pending in state court cannot serve  
 to toll the statute. See Ferguson v. Palmateer, 321 F.3d 820, 823  
 (9th Cir. 2003).

1 granted only if "extraordinary circumstances beyond [a] prisoner's  
2 control make it impossible to file a petition on time." Calderon  
3 v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th  
4 Cir. 1997) (citation and internal quotation marks omitted),  
5 overruled in part on other grounds by Calderon v. United States  
6 District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).  
7 The prisoner must show that "the 'extraordinary circumstances'  
8 were the cause of his untimeliness." Spitsyn v. Moore, 345 F.3d  
9 796, 799 (9th Cir. 2003) (citations omitted). Another statement  
10 of the standard is that a litigant seeking equitable tolling bears  
11 the burden of establishing two elements: "(1) that he has been  
12 pursuing his rights diligently, and (2) that some extraordinary  
13 circumstance stood in his way," preventing timely filing. Pace v.  
14 DiGuglielmo, 544 U.S. 408, 418 (2005).

15 The Ninth Circuit has said that the petitioner "bears the  
16 burden of showing that this extraordinary exclusion should apply  
17 to him." Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).  
18 Indeed, "'the threshold necessary to trigger equitable tolling  
19 [under AEDPA] is very high, lest the exceptions swallow the  
20 rule.'" Id. at 1066 (quoting United States v. Marcello, 212 F.3d  
21 1005, 1010 (7th Cir.), cert. denied, 531 U.S. 878 (2000)).

22 However, "[r]ather than let procedural uncertainties  
23 unreasonably snuff out a constitutional claim, the issue of when  
24 grave difficulty merges literally into 'impossibility' should be  
25 resolved in [a petitioner's] favor." Lott v. Mueller, 304 F.3d  
26 918, 920 (9th Cir. 2002). When a prisoner is proceeding pro se,  
27 his allegations regarding diligence in filing a federal petition  
28 on time must be construed liberally. Roy v. Lampert, 465 F.3d

1 964, 970 (9th Cir. 2006).

2 In its July 7, 2008 Order, the Court summarized the  
3 circumstances Petitioner alleged warranted equitable tolling:

4 [H]e states that on June 15, 2006, about one month  
5 after the statute of limitations began to run, he was  
6 transferred from Pleasant Valley State Prison to  
7 Corcoran State Prison. (Aug. 20, 2007 Mot. in Case no.  
8 C 07-04447 MJJ (PR) at 2.) He states that, during the  
9 move, his legal materials were "lost" and that he was  
10 prevented from preparing the instant petition during  
11 the time that his materials were missing. (Id. at 3.)  
12 Petitioner adds that "it was a total nightmare watching  
13 those eight months pass by with nothing he could do to  
14 help himself." (Id.) Petitioner filed a grievance in  
15 the Kings County Superior Court, which apparently  
resulted in the return of his materials on August 6,  
2007. To support this claim, Petitioner attaches a  
letter from the California Department of Justice to  
Superior Court Judge Lynn C. Atkinson dated August 3,  
2007, which states that Petitioner's materials had been  
"inadvertently lost by prison officials" during the  
prisoner transfer process but that they had eventually  
been mailed to him. (Id. at 4.) Petitioner also  
attaches a copy of the shipping label attached to his  
materials dated August 3, 2007. (Id. at 5.)

16 (July 7, 2008 Order at 6-7.) On June 21, 2007, two boxes  
17 containing Petitioner's legal notes and police reports were  
18 returned to him. (Opp'n at 3.) However his trial transcript and  
19 state appellate briefs were never found. It was not until August  
20 6, 2007 that he was given copies of these documents by the  
21 Attorney General's office. (Id.)

22 The Court found that Petitioner may be entitled to equitable  
23 tolling, stating:

24 Circumstances out of Petitioner's control may have  
25 made it legally "impossible" for him to complete his  
federal habeas petition within the normal statute of  
26 limitations. According to the letter to Judge  
Atkinson, Petitioner was deprived of his original trial  
transcript, the appellate court's decision, and other  
27 important documents. Because a number of Petitioner's  
claims deal with the events that occurred at trial, it  
28 may have been impossible for him to submit those claims

1 without the relevant legal materials. Therefore, the  
2 limitations period may be equitably tolled from June  
3 15, 2006 (the date of his prison transfer) until August  
4 6, 2007, the date when his materials were returned to  
him. Because Petitioner may be entitled to equitable  
tolling, the present petition may have been timely  
filed on April 3, 2008.

5 (July 7, 2008 Order at 7-8 (citation omitted).) The Court then  
6 gave the Respondent a chance to rebut Petitioner's assertions,  
7 stating: "Subject to Respondent's right to contest these facts,  
8 the Court will not dismiss the petition on its own motion for  
9 untimeliness." (July 7, 2008 Order at 8.)

10 In the present motion to dismiss, Respondent presents two  
11 arguments to support his contention that equitable tolling is not  
12 appropriate because Petitioner did not demonstrate that the  
13 extraordinary circumstances prevented him from filing a timely  
14 petition.

15 First, Respondent argues that Petitioner had full access to  
16 his files "from the date the California Supreme Court denied  
17 review on February 1, 2006 until June 15, 2007," and that  
18 Petitioner fails to explain why this time was insufficient to file  
19 a timely petition. (Reply at 2.) Respondent incorrectly  
20 calculates the period for which Petitioner must show diligence.  
21 As mentioned above, Petitioner claims that his legal materials  
22 were lost on June 15, 2006, about one month after the limitations  
23 period began to run on May 5, 2006. (Opp'n at 3.) He also  
24 alleges that he began working on his federal petition prior to the  
25 prison transfer, but the draft was lost during his transfer and  
26 never recovered. (Id.) The ninety-day time frame after the state  
27 supreme court's denial of review is allocated to allow Petitioner  
28 to file a petition for a writ of certiorari in the United States

1 Supreme Court; therefore, the limitations period only began to run  
2 after the ninety days elapsed, even if Petitioner did not file the  
3 certiorari petition. See Bowen, 188 F.3d at 1159. Petitioner  
4 cannot be penalized for his alleged lack of diligence in preparing  
5 a federal habeas petition during the time before the limitations  
6 period began to run. Moreover, any diligence in preparing a  
7 federal habeas petition on Petitioner's part prior to the transfer  
8 would have been fruitless because, as mentioned above, the  
9 petition he had begun to draft was lost along with the rest of his  
10 legal materials. (Opp'n at 3.)

11 Furthermore, Petitioner never recovered his own copies of the  
12 trial transcript and appellate briefs or the draft of his federal  
13 habeas petition. He diligently attempted to locate the legal  
14 materials he needed to prepare another draft of his federal habeas  
15 petition. He notified prison officials that his property was  
16 missing and made multiple requests -- beginning nine months before  
17 his limitations period ended -- to the prison and state superior  
18 court for assistance in locating and returning it. (Id. at 2-3.)  
19 Petitioner cannot be faulted because, despite his diligent  
20 efforts, it took 371 days for his copies of police reports and  
21 legal notes to be returned by the prison and forty-six additional  
22 days for the Attorney General's Office to replace his missing  
23 trial transcript and appellate briefs. Once he received these  
24 materials, Petitioner filed the present petition within a  
25 reasonable time frame -- approximately eight months later. (Id.  
26 at 4.)

27 Second, Respondent contends that Petitioner's lost legal  
28 materials were not needed to formulate the habeas petition.

1 Respondent bases this claim on the frequency with which Petitioner  
2 cites the trial transcript in the present habeas petition, which  
3 he characterizes as "rarely." (Reply at 2.) Respondent's  
4 argument is unavailing. As the Court noted in its Order Staying  
5 Habeas Proceedings, "[b]ecause a number of Petitioner's claims  
6 deal with the events that occurred at trial, it may have been  
7 impossible for him to submit those claims without the relevant  
8 legal materials." (July 7, 2008 Order at 7.) Petitioner argues  
9 that his legal materials were essential to formulate and organize  
10 his claims involving multiple witnesses, several state agencies  
11 and various articles of evidence from the trial. (Opp'n at 3-4.)

12 Because Respondent has failed successfully to contest  
13 Petitioner's allegation that the legal materials were necessary to  
14 file a timely federal petition, Petitioner is entitled to  
15 equitable tolling.

16 In sum, the limitations period started to run on May 5, 2006.  
17 After forty-one days had elapsed, on June 15, 2006, Petitioner's  
18 legal materials were lost. The limitations period is equitably  
19 tolled for 417 days (371 days plus 46 days), from June 15, 2006  
20 through August 6, 2007, when Petitioner received his legal  
21 materials. The limitations period then continued to run for 242  
22 additional days -- from August 6, 2007 until April 3, 2008, when  
23 he filed the present petition. Because only 283 days (41 days  
24 plus 242 days) of the limitations period elapsed before Petitioner  
25 filed his federal petition, he is well within AEDPA's one-year  
26 statute of limitations. Therefore, the present petition is timely  
27 filed.

28

Accordingly, the Court DENIES Respondent's motion to dismiss the federal petition as untimely (docket no. 14).

## CONCLUSION

For the foregoing reasons,

1. Respondent's motion to dismiss the petition as untimely (docket no. 14) is DENIED.

2. Within sixty (60) days of the date of this Order, Respondent shall file an Answer showing cause why a writ of habeas corpus should not be issued. Respondent shall file with the Answer a copy of all state records that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

3. If Petitioner wishes to respond to the Answer, he shall do so by filing a Traverse with the Court and serving it upon Respondent within thirty (30) days of his receipt of the Answer. Should Petitioner fail to do so, the petition will be deemed submitted and ready for decision thirty (30) days after the date Petitioner is served with Respondent's Answer.

4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court and Respondent informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). Petitioner must also serve on Respondent's counsel all communications with the Court by mailing a true copy of the document to Respondent's counsel.

5. Extensions of time are not favored, though reasonable

1 extensions will be granted. Any motion for an extension of time  
2 must be filed no later than ten (10) days prior to the deadline  
3 sought to be extended.

4 6. This Order terminates Docket no. 14.

5 IT IS SO ORDERED.

6 DATED: 7/30/2010



7 CLAUDIA WILKEN  
8 United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

SHERMAN L DAVIS,

Plaintiff,

Case Number: CV08-01978 CW

V.

DERRAL G ADAMS et al,

## Defendant.

## **CERTIFICATE OF SERVICE**

DERRAL G ADAMS et al,  
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 30, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: July 30, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk